United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

464

No. 21,935

James Covington,

Appellant,

v.

David W. Harris, Acting Superintendent,
Saint Elizabeths Hospital,

Appellee

Appeal from the United States District Court
for the District of Columbia

Charles R. Halpern
1229 - 19th Street, N.W.
Washington, D. C.

Stephen B. Rosenberg
2010 R Street, N. W.
Washington, D. C.

Counsel for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

I. Whether the civil commitment of Appellant violated statutory procedures because:

a. his commitment was ordered without a meaningful judicial determination of his mental condition;

b. the district court's failure to scrutinize his waiver of jury trial deprived him of his right to a jury determination of his mental condition.

II. Whether the civil commitment of Appellant violated his constitutional rights because:

a. his commitment was ordered without a meaningful judicial determination of his mental condition;

b. neither the Commission on Mental Health nor the district court articulated the reasons for their commitment decision;

c. Appellant's only hearing was before the Commission on Mental Health and no transcript was kept of that proceeding;

d. Appellant was not afforded counsel who effectively represented his interests.

III. Whether the district court erred in concluding that Appellant was properly confined in the maximum security facility at St. Elizabeths Hospital.

This case has not previously been before this Court.

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JURISDICTIONAL STATEMENT

This is an appeal from an order of the U.S. District Court for the District of Columbia denying the relief requested by Appellant in his petition for a writ of habeas corpus, and remanding Appellant to the custody of Appellee. The district court had jurisdiction under D.C. Code § 16-1901 (1967). This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant James Covington is a civilly committed patient at St. Elizabeths Hospital. He was civilly committed by order of the District Court on June 19, 1964. Prior to that time, he had been committed to St. Elizabeths Hospital under D.C. Code § 24-301(a), after he had been found not competent to stand trial in 1957.

Throughout his ten years in the Hospital, Appellant has not been out of the maximum security unit, except for medical care. In his present petition, Appellant seeks his release or, in the alternative, transfer out of John Howard Pavilion. He is now 57 years old.

The Civil Commitment Proceeding

In 1964, when Appellant had been in St. Elizabeths Hospital for more than six years,[1/] the Superintendent of the Hospital began civil commitment proceedings under D.C. Code § 21-310 (repealed).[2/] He filed a petition representing that Appellant was "of unsound mind and is in need of

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1/ In 1957, Appellant was charged with first degree murder. He was found to be not competent to stand trial and was committed to St. Elizabeths Hospital. On January 6, 1966, the United States Attorney dismissed the 1957 charge against the Appellant. In 1942, Appellant had pleaded guilty to second degree murder. No question was raised about his sanity, and he served for 14 years in Lorton Reformatory.

2/ Appellant was committed to St. Elizabeths Hospital under civil commitment procedures (footnote continued on next page)

care and treatment in a mental hospital," attaching affidavits of two St. Elizabeths staff psychiatrists. (A copy of the Petition is attached hereto as Appendix A.)

The two affidavits were identical, with the exception of the date since which the affiant knew Appellant. They stated:

> "I, the undersigned, being first duly sworn, depose and say that I am a citizen of the United States, presently employed by the United States Government as a member of the medical staff of Saint Elizabeths Hospital; that I have known James Covington, a 53-year-old male patient at Saint Elizabeths Hospital, since 1958 [or "September, 1962"]; that I believe the said James Covington is suffering from Psychotic Disorder with Mental Deficiency, and is of unsound mind. He is incapable of managing his own affairs and is not fit to be at large or go unrestrained, and, if permitted to remain at liberty, the rights of persons and property will be jeopardized and the preservation of public peace will be imperiled. He is a fit subject for treatment by reason of his mental condition. I am not related to him by blood or marriage."1/

The affidavits and the petition stated bare conclusions and did not describe the kinds of examinations that had been

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(Footnote continued from preceding page) as they were prior to the passage of the Hospitalization of the Mentally Ill Act of 1964. D.C. Code § 21-501 et seq. All the sections of title 21 of the District of Columbia Code hereafter cited in this brief have been repealed by that statute (Pub. L. No. 88-597, 78 Stat. 954, §19), unless otherwise noted.

1/ The diagnosis "Psychotic Disorder with Mental Deficiency" does not appear in the American Psychiatric Association diagnostic manual. Hence, these affidavits raise more questions than they answer.

given to Appellant, the meaning of his psychiatric diagnosis, or any other elaboration supporting the conclusions.

A hearing on Appellant's condition was held before the Commission on Mental Health on June 2, 1964. A guardian ad litem for Appellant was appointed. The Commission then filed with the district court a report and recommendation that Appellant be adjudged to be of unsound mind and committed to St. Elizabeths Hospital. (See Appendix B.) The report stated that a St. Elizabeths staff psychiatrist had testified that he had examined Appellant and had concluded that he was of unsound mind.

The report and recommendation addressed to the district court contained no summary of the testimony or the reasons for the Commission's conclusions. Nor did it contain any information about the patient's probable future conduct or the Hospital's treatment resources which would permit a judge to determine whether commitment would be "for the best interests of the public and of the insane person." D.C. Code § 21-315. Appellant's guardian ad litem filed a form report with the district court stating that he agreed with the conclusion of the Commission. (See Appendix C.)

The Appellant requested a jury trial, and a trial was calendared for June 17, 1964. By handwritten letter of

June 13, 1964, witnessed by two attendants at St. Elizabeths Hospital, the Appellant withdrew his request for a jury trial. (See Appendix D.)

The district court acted on the report and recommendation of the Commission on Mental Health without more and entered an order committing the Appellant. (See Appendix E.) Appellant is now in St. Elizabeths Hospital pursuant to this civil commitment.

John Howard Pavilion and St. Elizabeths Hospital

John Howard Pavilion is a unique service at St. Elizabeths Hospital.[1/] It is physically remote from the rest of the Hospital and it houses the patients who are thought to require maximum security. The nature and function of John Howard were described by Dr. Cameron in testimony in 1963. Hearings on the Administration and Operation of Saint Elizabeths Hospital Before the Ad Hoc Subcommittee on Saint Elizabeths Hospital of the House Committee on Education and Labor, 88th Cong., 1st Sess. (1963). At that time, it housed 350 patients assigned to the Hospital as a result of criminal proceedings, and 30 civilly committed patients. The few civilly committed patients were assigned there because they were "difficult and

1/ The service is named, aptly, after an English prison expert.

assaultive." (Id. at 47-48.) Patients assigned to John Howard have substantially less freedom and privileges than those assigned to other parts of the Hospital. (Id. at 22-23, 49.) For most civilly committed patients, the restrictive controls of John Howard Pavilion would be "detrimental to their rehabilitation." (Id. at 23.)

It is hardly open to dispute that a patient confined in John Howard suffers a much greater restraint on his liberty than one who is assigned to another part of the Hospital. Whatever its rehabilitative functions, John Howard Pavilion is physically a prison. Its inmates are locked in; they have no ground privileges; their outdoor activities are conducted in a walled-in yard identical to a prison yard; their visitors may be received only for a few minutes, and then in a prison-like visiting room; and they are denied access to many of the recreational, vocational and educational facilities available to other patients of the Hospital.

Generally, an effort is made to move patients from John Howard to outside services as a treatment measure and as a step to their eventual release from the Hospital. Dr. Cameron stated that patients "must be given an opportunity to learn to assume and to demonstrate increasing responsibility for their own behavior." (Id. at 22.) The process was

described by Dr. Cameron in testimony in 1963 before a subcommittee of the House Education and Labor Committee (p. 49):

> "MR. DANIELS. Once a patient is committed to the John Howard Pavilion, are any of them, at a future date, transferred to any other portion of your facility?
>
> "DR. CAMERON. Mr. Chairman, the patients are committed to St. Elizabeths Hospital and not to John Howard Pavilion. We ordinarily house them there at the outset, but we move them from John Howard to other facilities in the hospital when, in our judgment, they are ready for such a move.
>
> "MR. DANIELS. They are transferred then to your medium security facility?
>
> "DR. CAMERON. Ordinarily; yes, sir.
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> * * *
>
> "When he goes to the new ward, he would ordinarily be kept in a locked situation for several days until the personnel on that new ward can get acquainted with him and know more about him at first hand, rather than simply relying on the record sent with him.
>
> "Once they get acquainted with him, based on their own judgment and the recommendation of the staff from John Howard and with my concurrence, he would be given what we refer to as 'accompanied privileges.' This means that he may then move about the hospital campus in the company of an employee to work, to recreation, to church, to therapeutic activities, but always in the company of an employee.
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> * * *
>
> "If he acquits himself satisfactorily in this relationship, then we would afford him the opportunity to show increased responsibility for his own actions, by allowing him to go unaccompanied from the ward to

> his place of work, but usually to return to the ward by 4 or 5 o'clock in the afternoon. As he acquits himself satisfactorily in this way, we may allow him some privileges on the grounds in the evening after the regular workday is over, because, certainly, he is going to have leisure time on his hands if he ever returns to the community and he needs to learn how to utilize this time well, and he cannot unless he has a chance to try."

The 1957-1968 Period -- Appellant's Diagnosis and Treatment

Appellant was diagnosed officially on admission as suffering from Mental Deficiency, Idiopathic Psychotic Reaction, I.Q. 38, Severe. His I.Q. was tested again in 1961. The 1961 test indicated that he had an I.Q. of 52, an increase of 14 points.[1/] Dr. Weickhardt, his ward administrator, testified in the hearings below that the increase was due to amelioration of the psychosis which had interfered with Appellant's functioning at the time the first I.Q. test was administered. (Tr. 40)[2/] Dr. Weickhardt further stated that no I.Q. test had been administered to Appellant subsequent to the 1961 tests because "I.Q., once it is accurately determined, is a fairly constant thing throughout a person's

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1/ In 1967, Appellant's ward administrator, Dr. George Weickhardt, attempted to correct the Hospital's records to reflect Appellant's higher tested intelligence and improved condition. The Acting Superintendent declined the recommendation, so that "officially the diagnosis is still mental deficiency, I.Q. 38." (Tr. 26-27)

2/ The hearings below, October 23, 1967 and February 19, 1968, are hereinafter cited as "Tr."

life." (Tr. 41) On the other hand, in 1965, Dr. Weickhardt noted that "Mr. Covington is operating on a much higher intellectual level than the psychological tests would indicate. He is alert, cooperative and well-oriented."[1/] Yet no further intelligence tests have been undertaken to this day.[2/]

The record of Appellant's treatment in the Hospital is thin. Cf. D.C. Code § 21-562. There are approximately 16 notes in his 10-year file that relate in any way to his condition or the treatment of his mental illness. Aside from the

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1/ 507 Note, October 28, 1965. Copies of the official Hospital psychiatric records on Appellant cited herein have been lodged with the Clerk of the Court.

2/ See Freedman and Kaplin, Comprehensive Textbook of Psychiatry 850-52 (1967). This authoritative work states:

> "* * *[M]ental retardation is not a static condition but rather one that is subject to change in response to environmental as well as maturational factors.
>
> "Until recently, a patient admitted to a state institution for the mentally retarded often remained there for the rest of his life. Under the impact of new knowledge, however, an increasing number of residential patients are released into the community. Since permanent institutionalization is no longer considered necessary or beneficial for most mentally retarded, it is important to retest the mentally retarded patients in institutions at regular intervals to guarantee their basic right to live in a normal community if their general level of functioning improves sufficiently to permit it. This is obviously one of the many areas in which law makers will look for assistance from the medical and behavioral sciences." (Emphasis added.)

use of psychotropic drugs, there is no suggestion of any treatment program adapted to Appellant's needs.[1/]

Appellant's behavior in the maximum security unit has been characterized by a total absence of improper conduct. There is no evidence of his having engaged in any violent behavior. Dr. Weickhardt testified that he was "well-behaved." (Tr. 10) The Acting Superintendent characterized his conduct as showing "consistent behavior control." (Note, September 29, 1967.) In 1964, his ward administrator noted, "He is not a behavior problem on the ward and has gotten into no difficulty." (507 Note, July 11, 1964.) For many years since his commitment, Appellant "worked in the Broom Shop where he was permitted to use large knives and other sharp instruments." (507 Note, September 13, 1967; emphasis added.) No problems arose from these activities.

A primary treatment mode at St. Elizabeths is a step program of increasing the patient's responsibilities and liberties, with staff supervision and evaluation by the staff. See pp. 5-7, supra; see also, Findings of Fact and Conclusions

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1/ The one note which deals specifically with non-drug treatment, one referring him to occupational therapy, erroneously stated that he suffered from Schizophrenic Reaction and stated that a primary objective of the treatment was to "aid in adjustment to prolonged hospitalization." Note of June 26, 1967.

of Law, Dobson v. Cameron, H.C. No. 282-66 (1968); Rouse v. Cameron, H.C. No. 287-65, January 12, 1967, pp. 157, 160, Testimony of Dr. Straty Economon. Dr. Cameron has stated that transfer from John Howard and an increase in privileges is an essential element of such a program. See p. 5, supra. Despite the fact that Appellant's behavior was never violent and that he showed consistent ability to control his conduct over ten years, the Hospital has never made any effort to test his behavior in a part of the Hospital less secure than John Howard.

Since 1958, Appellant has been given psychotropic drugs in varying doses. In December 1966, his medication was reduced, and, according to Dr. Weickhardt, he "developed some murderous thoughts." (Tr. 9) His medication was then restored to its former level and there were no further incidents of this nature.

Prior Proceedings Relating to Transfer from John Howard Pavilion

In March 1967, Appellant filed a handwritten letter petitioning the district court to order his transfer out of John Howard. Counsel was appointed and a hearing was set, but the petition was withdrawn without prejudice when appointed counsel was informed that transfer was contemplated (May 8, 1967).

On September 13, 1967, Dr. Weickhardt recommended that Appellant be transferred from John Howard to a less secure unit in another section of St. Elizabeths. Dr. Weickhardt had been Appellant's ward administrator for almost the entire period of the latter's civil commitment. This recommendation was rejected by the Acting Superintendent, who, to Dr. Weickhardt's knowledge, had never had any actual contact with Appellant. (Tr. 30)

Shortly thereafter, Appellant, then 57 years of age, petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, stating that he believed that he was sane and requesting that he be transferred out of maximum security building. He stated that his health had been deteriorating and that he desired a chance to get out in the air and get a light job, such as picking up papers on the Hospital grounds. (See Appendix F.)

A hearing on the writ was held on October 27, 1967 before Judge Sirica. At this hearing, Dr. Weickhardt, Appellant's ward administrator, reiterated his recommendation that Appellant be transferred from John Howard to a "minimum security ward." (Tr. 12-13) Judge Sirica expressed his inability to understand "why the superintendent doesn't accept the advice of the doctor that [has] seen this man all the

time." (Tr. 13) The Hospital represented that it would reconsider the question of transfer in December 1967. On this representation, Judge Sirica continued the case to "find out what the superintendent does in December." (Tr. 14)

The Hospital did nothing in December with regard to Appellant's requested transfer. The Acting Superintendent did not reconsider his previous decision, and no recommendation was submitted to him. Indeed, there is nothing in the Appellant's records during the 17 weeks between the two hearings in the district court relating to transfer out of John Howard. The only entries in the Hospital records during this period were routine quarterly notes stating that he "continues to progress satisfactorily," September 30, 1967, and that there was "no significant change this quarter." December 31, 1967.

At the second hearing, Dr. Weickhardt changed his recommendation and stated that Appellant should not be transferred out of John Howard Pavilion. Dr. Weickhardt rested his change of opinion on an incident in January in which Appellant was suspected of giving or selling some phenobarbital, a sedative, to a fellow patient,[1/] and in which

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1/ The uncontradicted evidence is that Appellant never gave or sold this drug, or any other, to any patient. (Tr. 43) The doctor's testimony relating to the drug revealed that Appellant's alleged involvement was based on pure speculation. (Tr. 33-37, 43)

Appellant had failed to report promptly some contraband, i.e., money that was in the ward. Dr. Weickhardt stated:

> "At any rate, it appeared to me that if Mr. Covington cannot follow the regulations about contraband in the Maximum Security Building, that he could be even less inclined to follow them where there is less supervision."[1/] (Tr. 25)

Judge Hart dismissed the petition, pointing out that he based his decision not only on the "stolen money incident," but also on the prior decision of the Acting Superintendent. (Tr. 45-46)

On April 8, 1968, Appellant filed a notice of appeal in the district court. Leave to appeal without prepayment of costs was granted.

Developments Since the Hearings Below

The Hospital records on Appellant do not reflect any consideration of transfer since the February hearing. Indeed, since January 28, 1968, no entries have been made in Appellant's records by attending psychiatrists.

1/ It should be noted that money circulates freely in John Howard Pavilion. (Tr. 39)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. THE CONSTITUTION OF THE UNITED STATES

A. Fifth Amendment - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. STATUTES

A. The following sections of title 21, D. C. Code, which have since been repealed, are involved in this proceeding:

> 21-312 - "Upon the receipt of the report and recommendation of the commission, a copy shall be served personally upon the alleged insane person, his guardian ad litem, or his attorney, if he has one, together with notice that he has five days within which to demand a jury trial. A demand for hearing by the court, or a demand for jury trial for the purpose of determining the sanity or insanity of the alleged insane person may be made by the said alleged insane person or by anyone in his behalf, or a jury trial may be ordered by the court upon its own motion. If demand be made for a jury trial,

or such trial be ordered by the court on its own motion, the case shall be calendared for trial not more than ten days after demand for hearing by the court for a jury trial, unless the time is extended by the court. The commission, or any of the members thereof, shall be competent and compellable witnesses at any trial or hearing of an alleged insane person. In any case in which a commitment at public expense, in whole or in part, is sought, the corporation counsel or one of his assistants shall represent the petitioner unless said petitioner shall be represented by counsel of his or her own choice."

21-314 - "If no demand be made for a jury trial, the judge holding court shall determine the sanity or insanity of said alleged insane person, but such judge may, in his discretion, require other proofs, in addition to the petition and report of the commission, or such judge may order the temporary commitment of said alleged insane person for observation or treatment for an additional period of not more than thirty days. The judge may, in his discretion, dismiss the petition notwithstanding the recommendation of the commission. If the judge be satisfied that the alleged insane person is of sound mind, he shall forthwith discharge such person and dismiss the petition."

21-315 - "If the judge be satisfied that the alleged insane person is insane, or if a jury shall so find, the judge may commit the insane person as he in his discretion shall find to be for the best interests of the

public and of the insane person. In case of a temporary commitment, the court may make additional temporary commitments upon further examination by, and recommendation of, the commission.

"The judge may commit the insane person to the custody of the Veterans' Administration for care and treatment in a Veterans' Administration facility, if there has been filed with the court or the Commission on Mental Health, acting under the direction of the court, a certificate executed by the Administrator of Veterans' Affairs, or his duly authorized representative, showing said insane person to be entitled to such care and treatment, and that facilities therefor are available."

21-316 - "Recommendations of the commission must be made by the unanimous recommendation of the three members acting upon the case. If the three members of the commission be unable to agree upon the recommendation to be made in any case, they shall immediately file with the court a report setting forth the fact that they are unable to agree on the case, and in that event the court shall hear and determine the case, unless the alleged insane person, or someone in his behalf, shall demand a jury trial, in which event the case shall be heard and determined by the court and a jury.

"If the commission shall agree upon a recommendation, it shall file with the court a report setting forth its findings of fact and conclusions of law and its recommendation based thereon which recommendation shall be in one of the following forms:

"(A) That the person is of sound mind and should be discharged forthwith and the petition dismissed.

"(B) That the mental condition of the alleged insane person is such that a definite diagnosis can not be made without further study, or that the mental incapacity of said person will probably be of short duration, and that said person should be further detained and committed in Saint Elizabeths Hospital as hereinbefore provided for, or in any other hospital in the District of Columbia as provided in sections 21-326 to 21-331, for further observation or treatment for such period of time as the court may determine, during which said time the commission shall from time to time examine said person and make a recommendation to the court as to the final disposition of the case.

"(C) That the person is of unsound mind and (1) should be committed to Saint Elizabeths Hospital, or any other hospital provided by section 21-329, (a) at public expense, or (b) at the expense of those persons who are required by law, or who will agree to pay for the maintenance and treatment of said insane person, or (c) that the relatives of said insane person, mentioned in section 21-321 are able to pay a specified sum per month toward the support and maintenance of said insane person; (2) is harmless and may safely be committed to the care of his relatives or friends (naming them) who are willing to accept the custody, care, and maintenance of said insane person under conditions specified by the commission; (3) should be committed to the Administrator of Veterans' Affairs for care and treatment in a Veterans' Administration facility: Provided, That there shall be filed with the court or commission a certificate executed by said administrator

or his duly authorized representative, showing said person is entitled to such care and treatment and that facilities therefor are available."

B. The following section of the Hospitalization of the Mentally Ill Act, which became effective January 1, 1966, is relevant:

21-545 - "(a) Upon the receipt by the court of a report referred to in section 21-544, the court shall promptly set the matter for hearing and shall cause a written notice of the time and place of the final hearing to be served personally upon the person with respect to whom the report was made and his attorney, together with notice that he has five days following the date on which he is so served within which to demand a jury trial. The demand may be made by the person or by anyone in his behalf. If a jury trial is demanded within the five-day period, it shall be accorded by the court with all reasonable speed. If a timely demand for jury trial is not made, the court shall determine the person's mental condition on the basis of the report of the Commission, or on such further evidence in addition to the report as the court requires.

"(b) If the court or jury, as the case may be, finds that the person is not mentally ill, the court shall dismiss the petition and order his release. If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for

an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court."

STATEMENT OF POINTS

I. Appellant's civil commitment violated the statutory procedure in that the district court did not make an informed determination regarding his sanity and the propriety of commitment.

II. Appellant's civil commitment violated the statutory procedure in that Appellant was deprived of his statutory right to a jury trial without judicial scrutiny of his jury trial waiver.

III. The civil commitment of Appellant violated his constitutional rights in that:

a. the commitment was effected without a meaningful judicial proceeding;

b. neither the Mental Health Commission nor the district court articulated the reasons for the commitment decision;

c. no transcript was kept of the Mental Health Commission proceeding;

d. Appellant was denied the effective assistance of counsel.

IV. The record herein establishes that Appellant is being improperly held in the maximum security service at St.

Elizabeths Hospital. He is entitled to be transferred to a Hospital facility in which the deprivation of his liberty will be less complete.

SUMMARY OF ARGUMENT

I.A. Appellant's civil commitment pursuant to D. C. Code § 21-310 (repealed) is invalid. The civil commitment proceeding in 1964 did not follow the basic procedural requirements of the statute then applicable, in particular, D. C. Code §§ 21-314 and 21-315. These sections provide that the district court must make a determination (a) of the person's sanity and (b) of the appropriateness of commitment, before ordering that a person be committed. This Court has held, in related contexts, that such a judicial determination must be an informed judgment based on adequate facts. Conclusory assertions by psychiatrists are not a sufficient basis. Millard v. Cameron, 125 U.S. App. D.C. 383, 373 F.2d 468 (1966). Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964). Moreover, this Court has held specifically that a person has a right to full judicial consideration before civil commitment is ordered. Cameron v. Mullen, No. 20,308, dec. March 2, 1967; Bolton v. Harris, No. 21,032, dec. February 16, 1968.

In the instant case, the district judge had only conclusory assertions of Appellant's insanity on which to

make a judgment. He had no underlying data which would enable him to make an independent judgment as to Appellant's sanity. Moreover, he had no evidence whatsoever to support a conclusion that commitment would be "for the best interests of the public and of the insane person." Section 21-315.

In addition, the commitment procedure was fatally defective in that it failed to safeguard Appellant's statutory right to a jury trial on the question of sanity. Section 21-312. In this case, Appellant requested a jury trial and a trial date was set. Immediately prior to the trial date, Appellant filed a handwritten note waiving jury trial. The district court accepted this waiver with no effort to assure that it had been knowingly and voluntarily entered. In view of the facts that Appellant had previously been found incompetent and was at the time of waiver an involuntary patient at St. Elizabeths, the district court had an obligation to scrutinize closely Appellant's waiver. Pate v. Robinson, 383 U.S. 375 (1966). See Brookhart v. Janis, 384 U.S. 1 (1965); Johnson v. Zerbst, 304 U.S. 458 (1937).

B. The commitment procedure deprived Appellant of constitutionally protected rights. No person can be

deprived of his liberty, consistent with our constitutional form of government, except by judicial action. Since the commitment of Appellant was ordered, in effect, by the action of the Mental Health Commission, a non-judicial body, his commitment constitutes a deprivation of liberty without due process.

Furthermore, the Supreme Court, in a related context, has held that due process required that a judicial body making a critical decision which will affect substantial rights must articulate reasons for its decision and set out the factual basis therefor. Kent v. United States, 383 U.S. 541 (1966). In the instant case, neither the Mental Health Commission nor the district court gave any explanation for their decision to order Appellant's commitment. This failure, which insulates the substance of their decision from effective judicial review, deprives Appellant of his constitutional rights.

In addition, Appellant was improperly denied his right to a transcript of the Mental Health Commission hearing, the only hearing he was afforded. In a range of situations, the courts have recognized the

critical importance of a transcript. See, e.g., Hardy v. United States, 375 U.S. 277 (1964); Washington v. Clemmer, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964). The importance of a transcript is particularly great in this case since the proceeding was held before a non-judicial body, the commitment order was for an indefinite period, and Appellant had previously been found to be incompetent.

Finally, Appellant was denied the right to effective representation by counsel. Dooling v. Overholser, 100 U.S. App. D.C. 247, 243 F.2d 825 (1957). A guardian ad litem was appointed for Appellant, but the guardian filed a form report with the district court stating that he agreed with the conclusions of the Mental Health Commission. The guardian made no effort to assure that Appellant's right to a judicial determination of his sanity and commitability was made. Nor does the record indicate that he counseled Appellant in connection with his waiver of jury trial.

Because of the invalidity of the civil commitment proceedings, Appellant's commitment is invalid and he is entitled to be released. Dooling v. Overholser, supra.

II. In the event that the Court should conclude that Appellant is not entitled to immediate release, the record clearly establishes that Appellant is improperly confined in the maximum security facility, John Howard Pavilion, and is entitled to transfer to a different Hospital facility in which the deprivation of his liberty will be less complete.

The right to judicial review of assignments within the Hospital is clear. Stultz v. Cameron, 127 U.S. App. D.C. 324, 383 F.2d 519 (1967) (en banc). See Lake v. Cameron, 124 U.S. App. D.C. 264, 364 F.2d 657 (1966). The guiding principle is that a deprivation of liberty must be no greater than is necessary to fulfill the purposes of civil commitment: the state's right to treat the mentally ill and protect them from harming themselves; and the state's right to protect its citizens from harm caused by those rendered dangerous by mental illness. Confinement in John Howard is a much greater deprivation of liberty than is confinement in other parts of the Hospital. John Howard is comparable to a prison in the regulations and limitations that it imposes on its inmates. There are other facilities in the Hospital in which security precautions are strict but more flexible.

Appellant has resided in the maximum security service at St. Elizabeths Hospital for the past ten years. At no time has he been given increased privileges and, indeed, until the summer of 1967 he was never even considered for transfer out of John Howard. Yet, his conduct in John Howard throughout these ten years has been exemplary. He has been involved in no incidents involving violence. Indeed, for a large part of the period of his confinement, he was permitted to work in the Broom Shop where he regularly used large knives and other pointed instruments.

Appellant is given psychotropic drugs in John Howard; they could equally well be given in any other Hospital facility. The Hospital does not seriously advance any therapeutic justification for his continued confinement in John Howard. Indeed, given the Hospital's usual treatment approach -- gradually increasing the patient's responsibilities -- it appears that continued confinement in John Howard is of no therapeutic benefit. The reasons which the Hospital advances for continued confinement in John Howard are, arguably, related to Appellant's dangerousness.

In the face of his ten-year behavior record, they do not support the Hospital's position. Therefore, continued confinement in John Howard with the attendant massive deprivation of liberty is totally unjustified.

In the event that the Court accepts Appellant's contention relating to the invalidity of his commitment but permits his continued confinement, Appellant urges that such continued confinement be permitted only outside John Howard Pavilion.

ARGUMENT

I. APPELLANT'S CONTINUED CONFINEMENT UNDER THE 1964 COMMITMENT ORDER DEPRIVES HIM OF STATUTORY AND CONSTITUTIONAL RIGHTS.

In 1964, the Hospital instituted civil commitment proceedings against Appellant. Subsequently, on January 6, 1966 the criminal charges against him were dropped.[1/] Because the proceedings in the 1964 civil commitment deprived Appellant of constitutional rights and failed to comply with the terms of the statute, Appellant is now entitled to be released. Barry v. Hall, 68 U.S. App. D.C. 350, 357, 98 F.2d 222, 229 (1938); Dooling v. Overholser, 100 U.S. App. D.C. 247, 248, 243 F.2d 825, 826 (1957); Overholser v. Williams, 102 U.S. App. D.C. 248, 252 F.2d 629 (1958).

1/ It appears from the Hospital's 1964 records that Appellant was well able to understand the nature of the charge pending against him and to assist in his own defense. See 507 Note, April 29, 1964. Yet the Hospital apparently gave no consideration to returning him to court for trial. Instead, the Hospital assumed that he committed the crime charged, and the Hospital instituted civil commitment proceedings to assure his continued detention.

A. Appellant's Commitment Did Not Comply with Statutory Procedures.

1. Appellant Was Committed Without a Proper Determination of Commitability by the District Court.

Appellant was committed under civil commitment procedures, D.C. Code § 21-310 et seq., as they existed prior to the passage of the Hospitalization of the Mentally Ill Act of 1964. D.C. Code § 21-501 et seq. (1967 ed.). Under the then statutory procedure, the person to be committed is entitled to a hearing before the Commission on Mental Health. Section 21-311. Thereafter, the Commission makes a recommendation to the district court regarding the sanity of the person involved and whether he should be committed. D.C. Code § 21-316. The person involved is entitled to a jury trial in the district court on the question of sanity. Section 21-312. If no jury demand is made, the judge resolves the sanity issue. Section 21-314. In either case, the burden of deciding whether the person should be committed is on the district judge. Section 21-315. Before committing a person, the judge must make a finding that commitment is "for the best interests of the public and of the insane person." Ibid.[1/]

1/ The burden of proof in a civil commitment proceeding is on the party seeking (footnote continued on next page)

The statutory scheme presupposes that the district court will make an independent determination as to sanity and commitability. On the present record, it is apparent that the judge who ordered Appellant's commitment made no such determination.

This Court has frequently stated that a district judge must have adequate information in order to pass on questions relating to the mental state of persons before the court; and conclusory labels applied by psychiatrists do not provide an adequate foundation for an informed judicial opinion. In an analogous context, this Court held invalid a commitment under the Sexual Psychopath Statute which was based only on a "conclusory statement in the psychiatrists' report." Millard v. Cameron, 125 U.S. App. D.C. 383, 384, 373 F.2d 468, 470 (1966). In that case, like this one, the judge who signed the commitment order had before him only reports phrased in terms of bare psychiatric conclusions. The Court held:

> "A judicial determination based on a psychiatric examination must be an informed one, particularly where, as here, the result is indefinite confinement." (Id. at 470-71.)

(Footnote continued from preceding page) commitment. Dooling v. Overholser, 100 U.S. App. D.C. 247, 249, 243 F.2d 825, 827 (1957); Lynch v. Overholser, 369 U.S. 705, 711 (1962).

In the case of Holloway v. United States, 119 U.S. App. D.C. 396, 398, 343 F.2d 265, 267 (1964), the Court noted that a district court could not "make an informed decision [as to a defendant's competency] from a superintendent's letter that merely states [a conclusion] without supporting information and reasons . . . ."1/

This Court has recently emphasized the central place in civil commitment proceedings of the "de novo judicial hearing" on the issue of insanity. Cameron v. Mullen, No. 20,308, dec. March 2, 1967, p. 11 (emphasis added). In the Mullen case, the Court struck down a post-trial commitment

1/ In Washington v. United States, this Court noted with approval the action of the Judicial Conference with regard to reports on competency to stand trial:

> "The Judicial Conference of the District of Columbia has condemned the use of conclusory labels in hospital competency reports. In October 1965, the Conference recommended that 'The report of a court-ordered pretrial mental examination should be made in substantial detail, recounting what was done to get at the facts concerning the accused's mental condition and what those facts are, not merely the conclusions the psychiatrists have drawn from these facts.' See Judicial Conference of the District of Columbia, Report of the Committee on Problems Connected with Mental Examinations of the Accused in Criminal Cases, Before Trial ii, 56 (1966). And by letter of May 19, 1967, Chief Judge Curran directed the Superintendent of Saint Elizabeths to implement this recommendation." Washington v. United States, No. 20,232, Dec. 13, 1967, slip opin. p. 16, n.25.

under D.C. Code § 24-301(a) on the ground that the disparities between such procedure and the civil commitment procedure raised serious constitutional doubts. The Court noted that the civil commitment procedure afforded a right to a full judicial hearing on the sanity issue, and that the post-trial procedure could do no less.

The unequivocal right to a full judicial hearing in civil commitment proceedings in the District was also the foundation of the Court's decision in Bolton v. Harris, No. 21,032, dec. February 16, 1968. In that case the Court held that Section 24-301(d) requires a judicial hearing on present mental condition prior to commitment after a verdict of not guilty by reason of insanity. The Court stated that "the civil commitment procedure requires a judicial determination and places the burden of proving insanity on the Government." (Id. at 9; emphasis added.) The Court held that persons to be committed after a verdict of not guilty by reason of insanity "must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings." (Id. at 14-15.)[1/]

1/ The Court in Mullen and Bolton measured commitments under § 24-301 against the procedures (footnote continued on next page)

The statutory requirement of a "judicial determination," Bolton v. Harris, supra, contrasts sharply with the procedures accorded Appellant. In this case, the district judge had nothing before him but the petition from the Superintendent, the bare conclusions of two St. Elizabeths psychiatrists, and an equally uninformative report from the Mental

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(Footnote continued from preceding page) prescribed in the Hospitalization of the Mentally Ill Act, particularly the requirement for a judicial determination. Section 21-545 (1967 ed.). While Appellant was committed pursuant to statutory procedures prior to the passage of that Act, the requirement for judicial determination in Section 21-545 (1967 ed.) is no different from the like requirement in Section 21-315 (repealed). Hence, the Bolton and Mullen decisions compel the conclusion that the judicial determination of sanity was central to civil commitment procedure before, as well as after, the passage of the Hospitalization of the Mentally Ill Act. In light of the Bolton decision, it would create an invidious discrimination between two classes of mental patients in violation of the equal protection concept if a judicial determination of present mental condition was not required in civil commitment proceedings. See Bolling v. Sharpe, 347 U.S. 497 (1954).

In describing civil commitment procedure under the prior Act, the Supreme Court stated that the alleged insane person had a hearing before the Mental Health Commission "and then another hearing in the district court." Lynch v. Overholser, 369 U.S. 705, 711 (1962). The Court further noted that the burden of proof is on the party seeking commitment, and commitment can be effected only after the trier of fact--the judge or jury--is convinced of the person's insanity and commitability. Ibid.

Health Commission.[1/] The petition stated that Appellant was "of unsound mind and is in need of care and treatment in a mental hospital . . . ." The affidavits, which were virtually identical to each other, stated that Appellant was suffering "from Psychotic Disorder with Mental Deficiency, and is of unsound mind." They further stated, in boilerplate language, that "the rights of persons and property will be jeopardized and the preservation of public peace will be imperiled" if Appellant was not committed. The report of the Commission set out only bare conclusions.

Nothing before the judge indicated what kinds of examinations of Appellant had been made; what the character and history of his mental illness were; how it affected his conduct; what treatment had been afforded him in the Hospital and what he could anticipate in the future; or what his

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1/ In Carter v. United States, 102 U.S. App. D.C. 227, 236, 252 F.2d 608, 617 (1957), this Court stated with regard to psychiatric testimony:

> "The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion."

prospects for recovery were. The district judge in a civil commitment proceeding must play an active role. Where necessary, he has an obligation to initiate inquiries into the appropriateness of commitment. Lake v. Cameron, 124 U.S. App. D.C. 264, 364 F.2d 657 (1966). Cf. Haziel v. United States, No. 20,982, dec. September 27, 1968, slip opin. p. 5. With the paucity of information in Appellant's case, the district judge could not have made an informed judgment on Appellant's sanity.

Furthermore, Section 21-315 states that a district judge can commit a person only after he finds that commitment is "for the best interests of the public and of the insane person." To determine whether commitment is for the best interest of the public, the judge would have to have some information on the person's past and probable future conduct and the relationship of his conduct to his mental illness. He would have to know whether the public safety could be assured without commitment to St. Elizabeths Hospital (Lake v. Cameron, supra). To determine whether commitment was for the best interest of the person to be committed, the judge would have to be informed about the facilities available for treatment in the Hospital and elsewhere; the nature of the illness

and the state of psychiatric knowledge regarding a cure; the prospects for significant amelioration of the condition through commitment; and the possible antitherapeutic effects of commitment. The district court has a non-delegable duty to weigh all these factors in deciding whether a person should be committed. The record before the district judge in 1964 was devoid of any evidence that would permit him to make such a decision.

Under these circumstances, the district judge could do nothing but rubber-stamp the conclusion of the Mental Health Commission. This procedure is contrary to the requirements of the statute.

The district judge need not have held a hearing in every civil commitment proceeding under the old procedure. The statute permitted the court, in appropriate cases, to commit a person on the basis of the "petition and report of the Commission" without other proof. D.C. Code § 21-314. However, if the court were to follow such procedure, the petition and report must have contained sufficient factual information to permit an intelligent judicial decision. In the case of Holloway v. United States, supra, the Court interpreted the language of D.C. Code § 24-301(a), which permits

a district court to make a finding of incompetency to stand trial on the basis of a "report" from the Superintendent of St. Elizabeths. In stressing that bare conclusions were insufficient, the Court stated that the term "report" as used in Section 24-301(a) "must be construed compliably with the need for a judicial determination . . . ." 343 F.2d at 268. See also Rollerson v. United States, 119 U.S. App. D.C. 400, 343 F.2d 269 (1964).

In view of the district court's failure to follow the procedures prescribed by statute, the commitment of Appellant must be set aside. Dooling v. Overholser, 100 U.S. App. D.C. 247, 250, 243 F.2d 825, 826 (1957); Overholser v. Williams, 102 U.S. App. D.C. 248, 252 F.2d 629 (1958).[1/]

1/ The argument that Appellant somehow waived his right to a judicial determination of his sanity and commitability is frivolous in this context. Waiver of fundamental rights cannot be lightly implied. Johnson v. Zerbst, 304 U.S. 458 (1937); Fay v. Noia, 372 U.S. 391, 438 (1963); Henry v. Mississippi, 379 U.S. 443, 450 (1965); Brookhart v. Janis, 384 U.S. 1 (1965). In this case, Appellant never took any action that could be construed as waiving his statutory right to a judicial determination of his sanity and commitability. (See discussion of waiver of right to jury trial immediately following.)

2. Appellant Was Improperly Deprived of His Right to a Jury Determination of His Sanity.

Under D.C. Code § 21-312, a person has a right to trial by jury prior to commitment. In this case, Appellant requested a jury determination of his present mental condition, and a jury trial was calendared for June 19, 1964. His handwritten withdrawal of his jury demand, dated June 13, 1964 and filed on June 19, was witnessed by two Hospital attendants. It states no reasons for the withdrawal. The record is devoid of any indication that Appellant's waiver was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1937). See also Brookhart v. Janis, 384 U.S. 1 (1965); Carnley v. Cochran, 369 U.S. 506 (1962). This classic definition of waiver "furnishes the controlling standard" for review of waiver decisions. Fay v. Noia, 372 U.S. at 439.

The right to a jury determination of sanity is plainly a substantial right. There is some doubt whether a person facing civil commitment, whom the Mental Health Commission considers to be of unsound mind, should be permitted to withdraw a request for jury trial under any circumstances. Cf. Howard v. Overholser, 76 U.S. App. D.C. 166, 169, 130 F.2d 429, 432 (1942). Assuming that such waiver of jury trial is

permissible, however, the district court plainly has a duty to scrutinize the waiver and assure that the person involved has an understanding of the right which he is waiving.

In this case, there are additional considerations which required special judicial scrutiny:

1. Appellant had been found incompetent to stand trial in 1958 and was under judicial commitment at the time of the civil commitment proceeding. Furthermore, he had a tested I.Q. of 52 and a fourth-grade education. As the Supreme Court pointed out in the case of Pate v. Robinson, 383 U.S. 375, 384 (1966):

> ". . . [It] is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently 'waive' his right to have the court determine his right to stand trial."

2. Appellant had affirmatively indicated that he wanted a jury trial on his present mental condition. This affirmative step taken by Appellant made it incumbent upon the district court to explore his reasons for subsequently changing his mind.

3. Appellant's appointed guardian ad litem filed a report with the district court stating his agreement with the Mental Health Commission's recommendation that Appellant be

committed. Report of Guardian Ad Litem, filed June 5, 1964. (See Appendix C.) This report raises a question as to the adequacy of the counsel afforded Appellant after the filing of this report.[1/]

4. The conditions of Appellant's confinement were inherently coercive and cast doubt on any waiver executed under these circumstances. Appellant had been an involuntary patient for 6-1/2 years in St. Elizabeths Hospital at the time of the civil commitment proceeding. His future was very clearly under the Hospital's control. The Hospital's Superintendent was seeking his commitment; and his ward administrator had testified in the Mental Health Commission that he should be committed. Furthermore, he was under the influence of psychotropic drugs that affected his mental processes at the time of the waiver. Cf. Fay v. Noia, supra; Hansford v. United States, 124 U.S. App. D.C. 387, 365 F.2d 920 (1966).

1/ There is no suggestion in the record that the guardian counseled the Appellant at all in connection with the jury trial waiver, which was executed in John Howard and witnessed by two Hospital attendants. See Haziel v. United States, No. 20,982, dec. September 27, 1968; Anders v. California, 386 U.S. 738 (1967).

5. In his petition to the court seeking civil commitment of Appellant, the Hospital Superintendent stated:

> "The criminal charge presently pending against James Covington will be nol-prossed immediately following civil commitment being effected herein." Petition, May 19, 1964, p. 1, ¶ 3.

This promise might well have affected Appellant's decision to waive a jury trial.

These special circumstances should, at the least, have triggered a serious judicial inquiry into the voluntariness of the waiver of jury trial. In light of the failure of the district court to conduct any inquiry or even to question the defendant in person, this Court cannot conclude that such waiver was valid. Hence, Appellant was denied the right to a jury determination of his sanity.

B. The Commitment of Appellant Violated His Constitutionally Protected Rights.

Apart from the failure to follow the scheme established by the statute, the commitment of Appellant deprived him of liberty without due process and deprived him of his constitutional right to the effective representation of counsel.[1/]

1. Commitment Without Judicial Proceeding

Under the American constitutional system, a person cannot be deprived of his liberty except by the action of a duly constituted court. Non-judicial bodies may play an important role in procedures which eventuate in a deprivation of liberty, but such bodies cannot be entrusted with the decision to deprive a person of his liberty.[2/] In another

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1/ The fact that commitment is a "civil" rather than a "criminal" proceeding does not strip Appellant of all constitutional safeguards. In re Gault, 387 U.S. 1, 49 (1967). And the fact that the government is acting as parens patriae "is not an invitation to procedural arbitrariness." Kent v. United States, 383 U.S. 541, 555 (1966).

2/ The role of the Mental Health Commission is properly viewed as similar to a special master's. The Supreme Court has said of the master's report:

> "Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties." Railroad Company v. Swasey, 23 Wall. 405, 410 (1875). See also Ex parte Peterson, 253 U.S. 300 (1920).

context, the Supreme Court has noted:

> "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . ." Kent v. United States, 383 U.S. 541, 554 (1966).

Appellant was deprived of liberty without meaningful judicial action. The district court did not make an informed judgment before signing the order committing Appellant. And on the record before the court, it could not have made an informed judgment. In effect, the Mental Health Commission committed Appellant to indefinite confinement without a judicial decision. Therefore, Appellant was deprived of liberty without due process.

2. Lack of Findings To Support the Commitment Decision

Even if this Court considered the judicial action herein sufficient to meet the constitutional requirement for a judicial determination, Appellant has been denied the opportunity to have the kind of hearing required by the due process clause. In Kent v. United States, supra, the Supreme Court held that a minimum due process requirement in a waiver hearing in juvenile court is that the court make a statement of the reasons for the action it takes, including a statement of the relevant facts on which it acts. 383 U.S. at 561.

The Court held that the statement should be sufficient to demonstrate

> ". . . that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review." Ibid.

A statement of this kind is clearly required in the instant case. Yet neither the Mental Health Commission nor the district court articulated any reasons for their actions or stated the facts on which they acted.

3. Denial of a Transcript of the Mental Health Commission Proceeding

In this case, the Appellant in fact had only one hearing: his hearing before the Mental Health Commission. This Court has held that the Mental Health Commission hearing is a critical stage in the commitment proceeding. Dooling v. Overholser, 100 U.S. App. D.C. at 250, 243 F.2d at 828. And the Court has taken notice of the fact that in the great bulk of civil commitment proceedings, it is the only hearing that the person committed is given. Ibid.

What transpired at Appellant's hearing is a mystery. The Commission's report to the district court stated only that a St. Elizabeths Hospital staff physician testified

> "that he has examined and interviewed the patient and is of the opinion that he is in need of further

> hospitalization and treatment in Saint Elizabeths Hospital at this time because of his mental condition; the patient was committed to Saint Elizabeths Hospital on December 26, 1957, as mentally incompetent to stand trial on Criminal Case No. 1014-57 (Murder in the First Degree) in the U.S. District Court for the District of Columbia, with charge pending . . . ."1/

The substance of the testimony of the Hospital physician is unknown. Failure to provide Appellant with a transcript of the Commission hearing is a deprivation of due process.

The courts have recognized in several contexts that the right to a transcript is critical to preserving a party's rights. In Hardy v. United States, 375 U.S. 277, 280 (1964), the Supreme Court asked:

> "[H]ow can he [counsel appointed on appeal] faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript?"2/

See also Coppedge v. United States, 369 U.S. 438 (1962); Tate v. United States, 123 U.S. App. D.C. 261, 359 F.2d 245 (1966).

In the case of In re Gault, 387 U.S. 1 (1967), petitioner contended that his adjudicative hearing in the juvenile court was constitutionally invalid because, among other

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1/ A witness from the Department of Public Health also testified as to the residence of the patient and his social security number.

2/ In the instant case, the handicap imposed on counsel by the lack of a transcript is even greater than in Hardy. In Hardy, a partial transcript was provided. In the instant case, there is nothing but the Mental Health Commission's vacuous report.

reasons, no transcript of the proceedings was kept. Since it reversed on other grounds, the Supreme Court did not pass on the transcript question. The Court noted, however, its disapproval of the juvenile court's failure to provide a transcript, 387 U.S. at 58, citing favorably the numerous authorities that recommend the provision of transcripts in juvenile proceedings. 387 U.S. at 58, n.102. In his opinion concurring in part and dissenting in part, Justice Harlan stated his view that due process required provision of a record. He noted that providing counsel and a record of the proceeding

> "would permit the juvenile to assert very much more effectively his rights and defenses, both in the juvenile proceedings and upon direct or collateral review. The Court has frequently emphasized their importance in proceedings in which an individual may be deprived of his liberty, see Gideon v. Wainwright, 372 U.S. 335, and Griffin v. Illinois, 351 U.S. 12; this reasoning must include with special force those who are commonly inexperienced and immature. See Powell v. Alabama, 287 U.S. 45." 387 U.S. at 73.

This Court has held that a transcript should ordinarily be provided even in preliminary hearings in felony cases. Washington v. Clemmer, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964). The Court observed:

> "Absence of a transcript makes it difficult, if not impossible, to review the Commissioner's finding of probable cause." 119 U.S. App. D.C. at 218, 339 F.2d at 717.

The Court also stated that "minimum standards of fair and equal justice" would usually compel the provision of a transcript. Ibid.

The arguments for requiring provision of a transcript are most persuasive in the present case. Appellant had only one hearing in which he could attempt to refute the allegations which would deprive him of his liberty for an indefinite period. Since no record was made of that hearing, Appellant cannot have the substantive adequacy of that determination reviewed.[1/] Furthermore, Appellant had previously been found to be incompetent, and that finding had never been altered. Finally, his only hearing was before a panel made up of two psychiatrists and a lawyer, not before a judge conversant with constitutional principles and proper judicial procedures. The legal rights of a mentally ill person cannot be entrusted to such a panel, and effectively insulated from judicial review.[2/]

1/ The right to transcript is even more critical in the civil commitment context than in the Washington v. Clemmer situation. While the importance of a transcript in the latter context is very great, the preliminary hearing determines only temporary custody and the accused has the right to a subsequent jury trial to determine guilt. In civil commitment proceedings, there is usually no second hearing and the commitment is indefinite.

2/ There is reason to believe (footnote continued on next page)

ad litem was appointed to represent Appellant in the Mental Health Commission on May 27, 1964. He also served as guardian ad litem in the district court. On June 5, 1964, the guardian signed and filed with the district court a mimeographed form stating that he concurred in the report and recommendation of the Commission on Mental Health. He did not elaborate on or explain his reasons for agreement. Arguably, a guardian's filing of this form and his agreement with the Commission's conclusion would not necessarily disqualify him as a person able to represent Appellant's interests. Compare In re Basso, 112 U.S. App. D.C. 102, 290 F.2d 933 (1962), with Haziel v. United States, No. 20,982, dec. September 27, 1968, Anders v. California, 386 U.S. 738 (1967), Tate v. United States, 123 U.S. App. D.C. 261, 359 F.2d 245 (1966), and Johnson v. United States, 124 U.S. App. D.C. 29, 360 F.2d 844 (1966). In the context of this case, however, the guardian's agreement with the Commission plainly prejudiced his representation of the Appellant. Appellant had a clear right to a judicial determination of his sanity and his commitability. The guardian's failure to insist that an informed judicial determination be made constitutes ineffective representation.

4. Ineffective Representation of Counsel

This Court has recognized that a person involved in a commitment proceeding has a constitutional right to effective representation. Dooling v. Overholser, 100 U.S. App. D.C. 247, 249, 243 F.2d 825, 827 (1957). Appellant was denied the effective assistance of counsel in the civil commitment proceeding, thus depriving him of due process of law. A guardian

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(Footnote continued from preceding page) that the Mental Health Commission proceedings may in some cases be constitutionally defective. Hugh J. McGee, former chairman of the Bar Association Committee on Mental Health, described hearings conducted by the Commission in commitment proceedings as follows:

> "It is as kind, as friendly, as warm a treatment, and some of the hearings have been so chummy that they do not have too much legal appearance. Those are the cases where the patient's condition is so obvious and a few questions are asked about residence and about ability to pay, and then the hearing is over. But the interest of these psychiatrists and the doctors in keeping it non-traumatic is really a fine thing. I cannot imagine any other system that would make it more folksy or more comfortable without depriving the individual of some rights that we feel he should be entitled to, that the Constitution guarantees him." Quoted in Katz, Goldstein, Dershowitz, Psychoanalysis, Psychiatry and Law 485 (1967).

While there is no way of knowing precisely what kind of hearing was conducted in Appellant's case, the kind of hearing described by Mr. McGee would appear to fall below the due process standard.

This Court dealt with a similar problem in Haziel v. United States, No. 20,982, dec. September 27, 1968. In that case, assigned counsel in a juvenile proceeding filed a statement with the juvenile court stating that he found "no basis for requesting a hearing or further consideration relative to a waiver" of the case to the district court. The juvenile was thereafter waived without hearing. The Court held that the waiver following the filing of this statement by counsel did not provide adequate assurance that the rights of the juvenile were secured. The Court stated that the attorney had an obligation to review the question with his client and stated that counsel "wishing not to demand a waiver hearing, after consultation with his client, would be well-advised to indicate this exploration by letter to the Court." (Id. at 9, n.2.)

In the instant case it seems clear that the guardian did not consult with the Appellant before notifying the district court of his agreement with the determination made by the Commission on Mental Health. Therefore, the representation afforded Appellant plainly did not measure up to the standard of adequate representation outlined in the Haziel

case. Thus the district court's decision to commit Appellant was made in the absence of adequate representation of his interests.

The holding of the Supreme Court in Anders v. California, supra, provides further guidance. In that case, assigned counsel advised an appellate court that there was no merit to his client's appeal and withdrew from the case. The Court held that this procedure deprived the indigent appellant of effective representation and of his constitutional right to judicial review. The Court stated:

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity." 386 U.S. at 784.

The Court then outlined an adequate procedure for counsel who finds himself with an appeal which he considers without merit:

> "His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Ibid.

As the Court stated, "the court--not counsel--then proceeds after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Ibid.

The procedures outlined in Anders are even more critical in the present context. The guardian's "no-merit" report was not filed in an appellate court. It was filed in the district court. Thus, because of his counsel's action, the question of Appellant's commitment for an indefinite term never received any judicial scrutiny. Furthermore, the Appellant, a mental patient committed to St. Elizabeths, was far less able to protect his own interests than was the appellant in the Anders situation.

The courts have frequently reiterated the importance of providing effective counsel to the indigent, uneducated person confronted with a judicial proceeding and a substantial risk of loss of liberty. See Gideon v. Wainwright, 372 U.S. 335 (1962). How much greater must be the court's concern with the person involved is without friends or family, is thought to be insane, and is confronting commitment for an indefinite term. Cf. In re Gault, supra.

II. APPELLANT IS IMPROPERLY CONFINED IN THE HOSPITAL'S MAXIMUM SECURITY FACILITY.

A. Appellant's Right to Transfer from John Howard Pavilion Is a Proper Subject for Judicial Inquiry.

Appellant has a right to litigate on habeas corpus a claim for transfer from the maximum security service to a less restrictive place of confinement within the Hospital. In Stulz v. Cameron, 127 U.S. App. D. C. 324, 383 F.2d 519 (1967) (en banc), a hearing was held by the district court on the petitioner's claim that he was entitled to be transferred out of John Howard. This Court was not satisfied that an adequate hearing had been held, and remanded the case for further hearings on the transfer question, among others.[1/] See also Miller v. Overholser, 92 U.S. App. D.C. 110, 206 F.2d 415 (1963); Clatterbuck v. Overholser, 107 U.S. App. D.C. 340, 278 F.2d 20 (1960).

In the hearings below, the district court took testimony relating to the appropriateness of the facility in which Appellant was confined. The district court erred, however, in concluding that Appellant was properly confined in John Howard.

1/ On remand, at the request of appointed counsel for petitioner, the district court dismissed the petition by order of August 30, 1968, and no further hearings were held. H.C. No. 326-66.

The principles relating to the place and manner of confinement of the mentally ill were set out in Lake v. Cameron, 124 U.S. App. D.C. 264, 364 F.2d 657 (1966). The Lake case involved an elderly lady who had been civilly committed to St. Elizabeths. The Court held that such confinement was improper and that the patient had a right to a mode of care that was no more restrictive of the patient's liberties than was necessary to effectuate the purposes of civil commitment: the state's right, as parens patriae, to treat the mentally ill, and protect them from harming themselves; and the state's right, as guardian of the public safety, to protect its citizens from harm caused by those rendered dangerous by mental illness. See Higgins v. United States, 205 F.2d 650 (9th Cir. 1953); Wells v. Attorney General, 201 F.2d 556 (10th Cir. 1953).[1/]

1/ In the Lake case the Court held that the district court in a commitment proceeding has an obligation itself to determine what is the appropriate facility to which a person should be committed, if commitment is necessary at all. 124 U.S. App. D.C. 264, 267 (1966). No such inquiry was conducted in the instant case, and the committing judge did not have any information before him that would have permitted him to make such a determination.

While the alternative treatment facilities referred to in Lake were alternatives outside of the Hospital, the principle enunciated in that case is equally applicable here, particularly since confinement within the Hospital, outside of John Howard, would result in a marked easing of (footnote continued on next page)

Because these are the sole constitutional justifications for civil commitment, it follows that restrictions on individual liberty beyond those necessary to serve these ends constitute a deprivation of liberty without due process. As the Supreme Court has often noted in other contexts, legitimate purposes "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960); Louisiana v. NAACP, 366 U.S. 293, 296 (1961). "The breadth of ... abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964). Moreover, the imposition of restrictions on the liberties of a mental patient not justified either by treatment or the protection of society converts his confinement into imprisonment and constitutes

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(Footnote continued from preceding page) the restrictions presently placed on Appellant's freedom.

As recently as July 30, 1968, this Court indicated a keen interest in the practices of St. Elizabeths Hospital regarding the confinement of both civil and criminal patients in John Howard Pavilion. Kent v. United States, No. 20,922, dec. July 30, 1968, slip opin. p. 4, n.4.

"cruel and unusual punishment." Robinson v. California, 370 U.S. 660 (1962).[1/]

1/ Judicial scrutiny of assignments to John Howard Pavilion are particularly important since such assignments are frequently based on considerations of dangerousness, not treatment. Dangerousness is primarily a legal concept, not a psychiatric one. Hence, judicial review of the assignment of a patient to John Howard does not improperly trespass in the area of professional judgments by the Hospital staff. Indeed, the Hospital staff should welcome some sharing of the responsibility for supervision of potentially dangerous patients.

B. The Record Establishes that Appellant Is Entitled to be Moved Out of John Howard Pavilion.

In Lake v. Cameron, supra, this Court stated that the Hospital had an obligation to introduce evidence that a patient's commitment to a particular facility is appropriate in light of the objectives of civil commitment. The Court said, 364 F.2d at 661:

> "Appellant may not be required to carry the burden of showing the availability of alternatives. Proceedings involving the care and treatment of the mentally ill are not strictly adversary proceedings. Moreover, appellant plainly does not know and lacks the means to ascertain what alternatives, if any, are available, but the government knows or has the means of knowing and should therefore assist the court in acquiring such information."

Recently this Court stated, in Bolton v. Harris, that "the hospital must assist the court in acquiring all the relevant information on the patient's condition, treatment, etc." No. 21,032, slip opin. p. 18. Plainly, the information which would justify the assignment of a patient to John Howard or some other available facility is peculiarly within the Hospital's grasp.

Needless to say, transfer out of John Howard, with its prison-like security regulations and restrictive regimen, does not mean that a patient immediately has free access to

the streets. The Hospital has a number of medium security facilities, and patients normally have their privileges increased gradually. They may be moved from John Howard to locked wards on other services. After a period of acclimation, they are permitted on the Hospital grounds when accompanied by a member of the Hospital staff. If their conduct is appropriate, their privileges are gradually increased. See pp. 5-7, supra.

The Hospital has failed to justify Appellant's continued detention at John Howard Pavilion. Indeed, the record compels an opposite conclusion. Continued assignment of Appellant to John Howard would be justifiable on two grounds: (1) that Appellant obtains maximum therapeutic benefit by remaining in the maximum security service, or (2) that assigning Appellant to any less restrictive unit in the Hospital would pose a danger to the community.

There is no therapeutic justification for his continued confinement in John Howard. The only treatment Appellant apparently is receiving is tranquilizing medication, varied in dosage from time to time. (Tr. 34, 43) Obviously, this medication could be administered just as well in a different unit. (See Tr. 10.)

It appears that Appellant would be better off from a therapeutic point of view if he were transferred out of John Howard. For most civilly committed patients, the restrictive controls of John Howard Pavilion are "detrimental to their rehabilitation." House Hearings, supra, pp. 22-23. More important, transfer out of John Howard is normally a key part of a treatment program. It permits the patient to live in an environment that is less prison-like and progressively more like the world outside the Hospital. See supra, pp. 5-7.

The fact is that the Hospital is not providing Appellant with treatment that is calculated to prepare him to deal with increased freedom. The failure of the Hospital to move Appellant out of John Howard is closely related to the Hospital's failure to provide him with adequate treatment. His stagnation in John Howard mirrors the failure of the Hospital to provide him with any program that might return him to the community. Indeed, the Hospital has not seriously urged a therapeutic justification for Appellant's assignment to John Howard. The Acting Superintendent conceded that "the only thing gained out of continuing such a program would be time." Note, September 29, 1967.

The other possible justification for retaining Appellant in John Howard relates to his alleged dangerousness.[1/] It is true that Appellant, now 57 years old, was convicted of second degree murder in 1942.[2/] He was also charged with murder in 1957. He was, however, found to be incompetent to stand trial and has never been tried on that charge.[3/]

The uncontradicted evidence establishes that Appellant has been "a good patient" and "well behaved" and that his conduct in John Howard during the past ten years has been adaptive and nonviolent. (Tr. 4, 10-11) The testimony at the hearing and the Appellant's psychiatric records show

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1/ See Appendix G, "Operation Baxstrom After One Year" by Hunt and Wiley, in Mental Illness, Due Process and the Criminal Defendant, by The New York City Bar Association and Fordham Law School (1968).

2/ The Hospital records indicate that the deceased had drawn a knife on the Appellant while they were gambling. 507 Note September 13, 1967. There is no suggestion that that murder had anything to do with Appellant's mental illness, and he served a long term in Lorton Reformatory.

3/ Appellant's Hospital records reflect that the Hospital has consistently assumed Appellant's guilt of the second offense as well. A police report which was filed at the time has been taken to be an authoritative statement of the events that transpired and Appellant's culpability.

that for ten years Appellant has never once engaged in violent or assaultive conduct.[1/] For many of these years Appellant "worked in the Broom Shop where he was permitted to use large knives and other sharp instruments." 507 Note, September 13, 1967 (emphasis added).

The Acting Superintendent stated that Appellant had "shown consistent behavior control" and that "he has been no overt behavior problem in his 10-year hospitalization . . . ." Note of September 29, 1967. The infrequent psychiatric entries in his record indicate that he had a "pleasant attitude" (507 Note, November 4, 1963); that he was "quiet and cooperative" (507 Note, April 29, 1964); that "[h]e is not a behavior problem on the ward and has gotten into no difficulty" (507 Note, July 11, 1964); that "[t]he patient is cooperative and is not assaultive" (507 Note, April 16, 1965); that "he is perfectly cooperative" (507 Note, October 28, 1965).

1/ This record is more remarkable in light of the fact that John Howard is far from a peaceful place. In Dobson v. Cameron, 27 U.S. App. D.C. 324, 383 F.2d 519 (1967), Brief for Appellant at 41, the appellant was prepared to prove in the district court that during the period from January 1, 1966 to August 24, 1966, in John Howard there were 46 assaults, 27 of which resulted in injuries.

Despite this behavior record, Appellant was never considered for transfer out of John Howard Pavilion until the summer of 1967, after he filed a letter with the district court seeking judicial intervention to order his transfer out of John Howard.

On September 13, 1967, more than a year ago, Dr. Weickhardt, the doctor who was in charge of Appellant, recommended that he be transferred out of John Howard. His recommendation was rejected by the Acting Superintendent, who had apparently never seen Appellant. (Tr. 30) A hearing was held in October 1967, at which Dr. Weickhardt reiterated his belief that Appellant should be transferred. (Tr. 9) Judge Sirica adjourned the hearing upon the express representation that the Hospital would reconsider the transfer in December 1967. He said:

> "Let's continue it three months from today and find out what the superintendent does in December." (Tr. 14)

The Hospital did nothing in December. Dr. Weickhardt did not renew his recommendation, although there was no change in Appellant's condition; and the Acting Superintendent did not review the matter. Thus, the hearings were reconvened in February 1968 before Judge Hart.

On February 19, 1968, Dr. Weickhardt testified that he had changed his mind about transferring the Appellant. His reason, which related to an incident that occurred in January, can only be described as frivolous. Appellant complained that some money had been taken from him by another patient. (Tr. 24) Dr. Weickhardt testified that Appellant's behavior in regard to the stolen money -- reporting it to the authorities rather than resorting to self-help -- was "much to his credit." (Tr. 34) Yet Dr. Weickhardt felt that Appellant's failure to report at the outset the presence of money which is contraband in John Howard, justified his continued confinement under maximum security. Although it is well-known that money passes freely in John Howard (Tr. 39), Dr. Weickhardt seized on this violation of a minor regulation as a justification to continue Appellant's confinement under maximum security. This, together with some suspicions relating to a sedative,[1/] constituted the sole reasons why Dr. Weickhardt believed that Appellant could not be moved out of John Howard. This incident on its face would hardly seem relevant to the issue of dangerousness, much less conclusive.

1/ The Appellant categorically denied that he had sold or given the sedative to another patient. (Tr. 43) And the Hospital had only speculations (footnote continued on next page)

Dr. Weickhardt presented the only testimony on behalf of the Hospital in the hearing below. However, the court relied in part on the Acting Superintendent's refusal in September 1967 to approve Appellant's recommended transfer. (Tr. 45-46)[1/]

The Acting Superintendent's reasons for concluding in September that Appellant should remain in John Howard must be regarded as insubstantial. The Acting Superintendent's reasons, as of September 1967, were the following:

First, Appellant "has shown the capacity twice to murder." The one murder for which Appellant was convicted took place twenty-five years ago. He served time in prison for this offense, and there is no suggestion that it had anything to do with mental illness. Moreover, nothing will erase this conviction from his record. The fact of a conviction in 1942 will be the same ten years from now when

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(Footnote continued from preceding page) on which to proceed. There is simply no evidence that drugs found on the other patient were connected in any way with Appellant. Both pills and a liquid were found. The record indicates that the Hospital never administered any pills to Appellant. (Tr. 43) The liquid found was pink, as is Appellant's medication, but a number of other drugs are given as pink liquids -- and the Hospital did not analyze in any way the particular liquid found on the other patient. (Tr. 35) Moreover, Appellant was regularly given his medication and was required to swallow it in the presence of a nursing assistant. (Tr. 43)

1/ He disregarded the fact that the Acting Superintendent himself had intended to review the recommendation in December 1967, but failed to do so.

Appellant has a twenty-year record of good behavior in the Hospital in place of his present ten-year record. As to the second "murder, Appellant was accused but never tried. The Hospital errs lamentably in treating accusation as the equivalent of conviction. To allow the Hospital to resort to such a justification would result in sentencing Appellant to life imprisonment in John Howard for a crime he was never found guilty of and for a crime for which he has already served a sentence.

Second, the Acting Superintendent noted that it had been less than a year since Appellant had "expressed delusional content." But this "murderous thoughts" incident in December 1966 had not posed a danger to anyone, since no conduct had been involved; and any possible problems growing from his fleeting thoughts were averted by an increase in Appellant's medication. So far as the record reveals, Appellant has not had such thoughts since December 1966, but the Acting Superintendent has not reconsidered his decision since September 1967.[1/]

1/ The Kafkaesque dimension of holding a person indefinitely in a prison-like facility because of (a) an offense for which he was never tried, (b) an offense for which he had been previously punished, and (c) his impure thoughts should not be overlooked.

Third, the Acting Superintendent, in an admission which goes far to explain Appellant's continued confinement in John Howard, candidly stated that there was no space in medium security wards to accommodate Appellant. This fact, of course, has nothing to do with Appellant's condition or the appropriateness of his continued confinement in John Howard. Rather, it is an admission by the Hospital of its inability to provide the Appellant with appropriate treatment and an appropriate place of confinement.[1/]

Finally, both Dr. Weickhardt and the Acting Superintendent expressed concern about Appellant's possible conduct under the influence of alcohol were he to obtain some. (Tr. 10) Yet, they recognized that he was a "faithful A.A. member," who attended meetings regularly in John Howard. 507 Note, September 13, 1967. And Dr. Weickhardt admitted that he did not know whether alcohol would have any adverse effect on Appellant. Ibid. Further detention in John Howard

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1/ This Court has held that "continuous failure to provide suitable and adequate treatment cannot be justified by a lack of staff or facilities." Rouse v. Cameron, 125 U.S. App. D.C. 366, 373, 373 F.2d 451, 457 (1967).

In summarizing Dr. Harris' views on transfer, Dr. Weickhardt, in his testimony, does not mention this factor, which seems to have had major importance in Dr. Harris' thinking.

could hardly help Appellant solve any problem he may have had with alcohol.

None of these reasons individually is sufficient to justify detaining Appellant in John Howard, and together they do not justify this result. They mask a story of bureaucratic neglect, timidity in handling a person who had committed a serious crime in the past, and a preference for taking the "safe" course at the expense of the liberties of Appellant.

The neglect, timidity and disregard for Appellant's rights continue to this day. Since the hearings below, there has been no further consideration of transfer. Indeed, since January 1968, no entries have been made in Appellant's files by attending psychiatrists.

CONCLUSION

For the reasons stated in part I of this brief, Appellant was not validly committed to St. Elizabeths Hospital. Therefore, he is entitled to immediate release.

In the event that the Court concludes that Appellant is not entitled to immediate release, Appellant respectfully requests this Court to hold that his continued confinement in John Howard Pavilion is improper and to order his transfer to a more suitable facility in the Hospital.

Respectfully submitted,

Charles R. Halpern
1229 - 19th Street, N. W.
Washington, D. C.

Stephen B. Rosenberg
2010 R Street, N. W.
Washington, D. C.

Counsel for Appellant
(Appointed by this Court)

October 16, 1968

IN THE MATTER OF :

JAMES COVINGTON :
M-53
Patient
St. Elizabeths Hospital :

:

APPENDIX A
Page 1 of 4

872-61

Mental Health No. _____

FILED

MAY 19 1964

HARRY M. HULL, Clerk

P E T I T I O N

Comes now Dale C. Cameron, Superintendent, Saint Elizabeths Hospital, petitioner herein by his attorney, David C. Acheson, United States Attorney, in and for the District of Columbia, and in his official capacity represents to the Court as follows:

1. The jurisdiction of this Court is invoked pursuant to the provisions of Title 21, D. C. Code, Section 310, as amended.

2. James Covington, male and fifty-three (53) years of age, was charged in the United States District Court for the District of Columbia with first degree murder in Criminal Case No. 1014-57. On December 26, 1957 he was committed by the Court to Saint Elizabeths Hospital after having been adjudicated as mentally incompetent to stand trial.

3. The staff of Saint Elizabeths Hospital advises that James Covington is of unsound mind and is in need of care and treatment in a mental hospital, as evidenced by the certified affidavits of the two physicians attached. The criminal charge presently pending against James Covington will be nol-prossed immediately following civil commitment being effected herein.

WHEREFORE your petitioner prays:

1. The writ provided by law issue, and the Commission on Mental Health be directed to examine the patient and report its findings to the Court.

2. That the patient be committed to Saint Elizabeths Hospital pending determination of the need for the patient's continued confinement in a mental hospital.

3. That counsel be appointed to represent the patient at all stages of these proceedings.

4. That a committee of his estate be appointed if necessary.

5. For such other and further relief as the best interests of the patient may require and to the Court may seem just and proper.

David C. Acheson

DAVID C. ACHESON
United States Attorney

Charles T. Duncan

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

Oscar Altshuler

OSCAR ALTSHULER
Assistant United States Attorney

Subscribed and sworn to by Oscar Altshuler, Assistant United States Attorney, before me this 12th day of May 1964.

My Commission Expires Feb. 28, 1964

Ellen E. Fowler

Notary Public,
District of Columbia

872-61

FILED

MAY 19 1964

HARRY M. HULL, Clerk

AFFIDAVIT

I, the undersigned, being first duly sworn, depose and say that I am a citizen of the United States, presently employed by the United States Government as a member of the medical staff of Saint Elizabeths Hospital; that I have known James Covington, a 53-year-old male patient at Saint Elizabeths Hospital, since 1958 [October, 1962]; that I believe the said James Covington is suffering from Psychotic Disorder with Mental Deficiency, and is of unsound mind. He is incapable of managing his own affairs and is not fit to be at large or go unrestrained, and, if permitted to remain at liberty, the rights of persons and property will be jeopardized and the preservation of public peace will be imperiled. He is a fit subject for treatment by reason of his mental condition. I am not related to him by blood or marriage.

David J. Owens, M. D.
Saint Elizabeths Hospital
Washington 20, D. C.

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me this 5th day of May 1964, A. D.

Notary Public, D. C.

My Commission Expires March 14, 1969

872-64

FILED

MAY 19 1964

HARRY M. HULL, Clerk

AFFIDAVIT

I, the undersigned, being first duly sworn, depose and say that I am a citizen of the United States, presently employed by the United States Government as a member of the medical staff of Saint Elizabeths Hospital; that I have known James Covington, a 58-year-old male patient at Saint Elizabeths Hospital, since September 1962; that I believe the said James Covington is suffering from Psychotic Disorder with Mental Deficiency, and is of unsound mind. He is incapable of managing his own affairs and is not fit to be at large or go unrestrained, and, if permitted to remain at liberty, the rights of persons and property will be jeopardized and the preservation of public peace will be imperiled. He is a fit subject for treatment by reason of his mental condition. I am not related to him by blood or marriage.

Wilbur A. Hamman, M. D.
Saint Elizabeths Hospital
Washington 20, D. C.

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me this 18th day of May 1964, A. D.

Notary Public, D. C.

My Commission Expires March 14, 1969

JAMES COVINGTON

APPENDIX B

Mental Health No. 872-64 Page 1 of 2

Patient
M-53

FILED
JUN 3 1964
HARRY M. HULL, Clerk

REPORT AND RECOMMENDATIONS OF COMMISSION ON MENTAL HEALTH

TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:

The Commission on Mental Health, acting under the direction of this Court, has made an examination of the mental condition of James Covington and has inquired into his affairs, having conducted a hearing on the 2d day of June 19 64, and having examined the patient, relatives, friends and witnesses upon the issue of his mental condition and their ability to pay the expenses of his maintenance and treatment in a hospital, and reports its findings to be:

1. That James Covington, a non-resident (floater) of the District of Columbia, is of unsound mind suffering from Psychosis with Mental Deficiency, and is incapable of managing his own affairs and should be committed to a hospital for treatment of his mental condition.

2. That the resources of James Covington are unknown at this time.

3. Present at the hearing were: Dr. Wilbur A. Hamman, Staff, Saint Elizabeths Hospital, who testified that he has examined and interviewed the patient and is of the opinion that he is in need of further hospitalization and treatment in Saint Elizabeths Hospital at this time because of his mental condition; the patient was committed to Saint Elizabeths Hospital on December 26, 1957, as mentally incompetent to stand trial in Criminal Case No. 1014-57 (Murder in the First Degree) in the U. S. District Court for the District of Columbia, with charge

FPI ATLANTA—6-12-63—5M—4201

pending; Anna Lojiotis, Interstate Services, Department of Public Health, testified to the residence of the patient, that he is single, and that his social security number is 577-18-6007; the necessary investigations will be completed to ascertain the patient's state of legal residence and arrangements made for his return thereto; the patient was informed of the recommendations for further hospitalization and treatment in Saint Elizabeths Hospital at this time because of his mental condition; Richard Murray, Guardian ad litem, 114 Woodward Building, concurred with such recommendations.

WHEREFORE, The Commission on Mental Health recommends to the Court as follows:

1. That James Covington be adjudged and decreed to be of unsound mind.

2. That James Covington be committed to Saint Elizabeths Hospital for maintenance and treatment of his mental condition, until such time as he may be safely discharged therefrom or returned to the state of his legal residence.

3. That the expense of the maintenance and treatment of James Covington in Saint Elizabeths Hospital shall be borne in accordance with the provisions of Title 32, Section 401 (a), D. C. Code, 1961 Ed.

[illegible]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF)
)
JAMES COVINGTON,) MENTAL HEALTH NO. 872-64
)
PATIENT)

FILED
JUN 5 1964
HARRY M. HULL, Clerk

REPORT OF GUARDIAN AD LITEM

I, Richard Murray, appointed guardian ad litem herein for the above-named patient, respectfully report to the Court that I did attend the hearing before the Commission on Mental Health in the above-entitled matter; that at the said hearing I did represent the above-named patient as his guardian ad litem; and that I do (do not) concur in the recommendation made by the Commission on Mental Health with respect to the patient.

June 4 19 64 Richard Murray
Guardian ad litem

Note: If it is desired to make further comments, the above space may be utilized, or an additional sheet attached hereto.

APPENDIX D

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

In Re:

JAMES COVINGTON M. H. No. 872-64

St. Elizabeths Hospital
John Howard Pavilion

FILED
JUN 19 1964
HARRY M. HULL, CLERK

June 13, 1964

I, James Covington, wish to withdraw my request for a jury trial on June 17, 1964

James Covington

Witness by Albert M. Newton M.D.
" " Charles H. Francis M.D.

CMH 8

APPENDIX E

Psychosis with Mental Deficiency

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In the Matter of

JAMES COVINGTON

Patient

M-53

Mental Health No. 872-64

FILED

JUN 19 1964

HARRY M. HULL, CLERK

DECREE OF ADJUDICATION AND COMMITMENT

This matter coming on to be heard in open Court, for final hearing considering the petition filed herein and the report and recommendations of the Commission on Mental Health, who, having made an examination of the mental condition of the patient, and having conducted a hearing, at which the patient, his relatives, friends and witnesses testified and were examined upon the issue of his mental condition and ability to pay the expense of maintenance and treatment in a hospital, found the patient to be of unsound mind and in need of treatment in a hospital for his mental condition; and a demand for a trial by a jury or further hearing by the Court having been filed within five days as provided by law, and having been withdrawn it is by the Court, this 19th day of June 1964

ADJUDGED and DECREED:

1. That James Covington, a non-resident (floater) of the District of Columbia, is of unsound mind and is hereby committed to Saint Elizabeths Hospital until such time as he may be safely discharged therefrom or returned to the state of his legal residence.

2. That the expense of the maintenance and treatment of James Covington in Saint Elizabeths Hospital shall be borne in accordance with the provisions of Title 32, Section 401 (a), D. C. Code, 1961 Ed.

1

United States District Court
For the District of Columbia.
Washington, 1, D.C.

petetioner.
J. James. Covington,

For Writ of Habeas Corpus. No. 412-67

against

Dr. Dale C. Cameron.
Superintendent of St.
Elizabeth's Hospital,
Washington, 32, D.C.

Your Honor I have been civil
Committed here in John Howard
pavilion, maximum security
now for 2½ years.
I ask This Honorable Court to transfer
me out of This Building to some
Very good Ward and Service

2

of St. Elizabeths Hospital.
I would like to have a light job
on the Grounds just any Kind of
Work like picking up paper on the
Grounds I am Now 57. years
old and my health is getting bad
I have been in the Hospital for
about 10. years but I have been
Civil Committed for 2½. years.
I Worked here in the Broom Shop
for 5. years.
your Honor. I believe I am Sane, but I
am not asking for Freedom.
I am only asking to be Transferred
Out of this Maximum Security
Building.
I believe my Record here
in this part of the
Hospital is good.

3

I don't think my charge was too bad, 10. years ago,
I ask this Honorable Court to please grant this my writ and hear it in an open Court.

Thanks so much,

Respectfully,

James Covington

Subscribed and Sworn to before me this said day of 8th day of Sept. 1962. 1967.

Notary public, D.C.

Paupers Oath.

your Honor I am a pauper. I dont have any money to pay this Honorable Court With.
I also ask this Honorable Court To appoint me a Lawyer.
To handle this my Writ for m
I thank this Honorable Court so Very much.

Respectfully,

James Covington

Subscribed and sworn To before me this said day of, 8 day of Sept 1967.

Notary public. D. C.

I Send a Copy of this Writ.

OPERATION BAXSTROM AFTER ONE YEAR*

By Robert C. Hunt, M.D. and E. David Wiley, LL.B.

On February 23, 1966, the Supreme Court of the United States held that Johnnie K. Baxstrom was denied equal protection of the laws by the statutory procedure under which he was held at the Dannemora State Hospital (*Baxstrom v. Herold*, 383 U.S. 107). This is an institution of the New York State Department of Correction for "insane criminals," persons declared mentally ill while serving a criminal sentence. Baxstrom had been certified as insane and transferred to Dannemora in June, 1961, while serving a sentence in a state prison. When his maximum sentence expired in December, 1961, Baxstrom was civilly committed to Dannemora under the provisions of section 384 of the Correction Law, which gave procedures for retaining persons found still mentally ill on expiration of sentence.

The Supreme Court in effect held section 384 to be in violation of the equal protection clause of the Fourteenth Amendment: (1) by failure to grant the right to "the jury review available to all other persons civilly committed in New York," and (2) by "civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those like Baxstrom nearing the expiration of a penal sentence."

Compliance with the Supreme Court decision required immediate administrative moves. Baxstrom was only one of about 400 patients held at Dannemora under section 384 which had just

* A version of this appendix appeared in the American Journal of Psychiatry 124 (1968), pp. 974–78. Reprinted by permission. Read at the annual meeting of the American Psychiatric Association, Detroit, Michigan on May 11, 1967.

been struck down. An additional 250 patients at the Matteawan State Hospital of the Department of Correction were in a similar situation, held after expiration of sentence for an offense less than a felony. Furthermore, the legal minds involved felt that the principles of the *Baxstrom* decision might apply to several hundred more patients held under other statutes at Dannemora and Matteawan. With the first 650 there could be no question; they had to be discharged from the Correction hospitals as quickly as possible, and there was immediate urgency about 24 patients under section 384 at Dannemora who had writs of habeas corpus pending.

A conference in Albany on March 8 worked out broad outlines of procedure to admit these patients to civil state hospitals of the Department of Mental Hygiene on new civil certifications as they were discharged from the Correction hospitals. Correction people were responsible to identify *Baxstrom* cases, screen them as to the need for further hospital care, get records and other paper work completed, and have the patients examined, certified, and transported. We in Mental Hygiene were responsible to allocate each patient to one of the eighteen civil hospitals, and to make preparations for the reception, care and treatment of the patients.

On March 11 a team of four Mental Hygiene psychiatrists screened the 24 Dannemora patients with pending writs. From this experience, a method was worked out for rapid survey and allocation of the larger groups. The Correction hospital people organized their records so that Mental Hygiene agents could see at a glance the data they needed: the patient's place of residence, his family residence and interest, any dangerous tendencies requiring special precautions. By March 23 the entire backlog of 632 identified *Baxstrom* patients had been surveyed and allocated; the Correction hospitals had completed their formidable administrative preparations and were ready to move patients as rapidly as the Mental Hygiene hospitals could take them. Meanwhile, the civil hospitals had been notified of the impending influx, and of the approximate numbers they could expect.

The guiding principle in the distribution was to send each patient to the hospital serving his district of residence. This was

not always simple. Often the residence of record was just where he happened to be on arrest, while his lifelong home was in another part of the state. Much of the difficulty in allocation stemmed from three-fourths of the patients' being from New York City, where there was the least readily available space to accommodate them. Five of the eight hospitals serving the city were so crowded that they could take only token numbers. Half of the entire load was concentrated on the three large hospitals on Long Island: Central Islip, Kings Park, and Pilgrim. The upstate hospitals took residents of their own districts, but also helped relieve the pressure on the metropolitan area by taking the patients with unknown or out-of-state residence, and New York City residents who appeared to have no interested family or friends.

The actual transportation of the patients began in the middle of March. By the end of the month 388 had been moved, and another 323 during April. Thereafter the flow was less, the total number reaching 969 by the end of August when the *Baxstrom* deck was arbitrarily closed to further additions. The small continuing flow of patients from Correction to Mental Hygiene since then is regarded as normal routine.

The final *Baxstrom* deck swelled beyond the original 652 in a variety of ways. There were several groups in the Correction hospitals under statutes not specifically upset by the *Baxstrom* decision, but thought to have the same legal principles involved. Then on July 1, 1966, a new statute for the first time gave to persons under sentence in Dannemora and Matteawan the same right to earn time off for good behavior as enjoyed by other prisoners. This immediately created another 100 patients eligible for a civil hospital even though the maximum sentences had not expired.

The civil state hospitals receiving the *Baxstrom* patients were reminded that these were now "civil cases, with nothing in their legal status requiring special security measures. Ward placement, precautions, treatment and disposition will be determined by the clinical condition, giving due consideration to any dangerous tendencies in accordance with standard practice." Two of the hospitals receiving large numbers, about 150 each during

March and April, set up special wards for the processing of the *Baxstrom* patients. One of these had anticipated maintaining such a special unit indefinitely. It was quickly evident, however, that there was no clinical need for this, and both special units were disbanded as the patients reached the end of their initial 60-day observation period. In all other hospitals the *Baxstrom* patients were admitted and studied in the regular reception services and given ward assignments like anyone else. By the end of May all had been absorbed into the hospital populations, scattered through different wards, and at least one-fourth of them were known to reside on open wards.

There were staff anxieties at all levels when the *Baxstrom* operation was first announced. Union officials protested against what they considered a dangerous move, and demanded that there be special training and special pay before working with *Baxstrom* patients. This quickly subsided with assurances that most of these patients should present no special management problems, and that any who proved too difficult for a civil hospital would be committed to Matteawan. The sudden influx of new patients did create some staffing problems, and these were eased by an emergency allocation of additional attendant positions for those hospitals receiving large numbers.

In the neighborhoods surrounding the civil hospitals there were also some flurries of anxiety. With one exception, these died down with explanation and reassurance. Serious public reaction occurred in just one town, as a reactivation of panic from an event of eight years before. This also subsided in time, but only after a great deal of difficult educational work with the community.

At the end of the first year the most striking news is that there is no news. None of the hospitals has any particular problems to report. The hospital directors all use similar terms in conveying that the *Baxstrom* patients are no more problem than anyone else, that nobody any longer thinks of them in any special way, that no lists are kept and that one never hears any reference to this group by staff or patients. One hospital reported ward staffs requesting their share of *Baxstrom* patients because they had turned out to be such good workers. The great majority of these

patients were long-term schizophrenics, well stabilized and adjusted to hospital routines.

At the end of February, 1967, of the 969 *Baxstrom* patients, 702 were in hospital. There had been 176 discharges, 147 of these to the community and the remainder to other hospitals. There had been 62 placements on convalescent care, 10 transfers out, and 24 deaths. A few were on escape, leave, or family care. It had been anticipated by some officials that as many as one-fourth of the *Baxstrom* patients might prove too dangerous for civil hospitals. As it has worked out, just seven have been found difficult enough to warrant committing them to Matteawan on a judicial determination that they were dangerous. Of those released, there is a record of one subsequent arrest, for petit larceny.

Nearly all of the patients were admitted to the civil hospitals on two-physician certificates good for only 60 days, after which the patients must be released or converted to some other form of admission. Almost half of the *Baxstrom* patients, some 454, elected to remain in hospital on voluntary or informal status. Court-ordered retention was used for the others who remained.

A development for the civil hospitals, related to the *Baxstrom* decision, is a change in the disposition of indicted defendants found to be so mentally ill as to be incapable of standing trial. Until recently all such persons were committed to the Matteawan State Hospital under section 662-b of the Code of Criminal Procedure, to be held there until restored to sanity, at which time they are returned to the court for criminal proceedings. A new statute effective in September, 1965, committed these to the Commissioner of Mental Hygiene, to be placed either in Matteawan or in a civil hospital, depending upon how dangerous they were thought to be. In the first ten months under this statute, 148 such patients were admitted, 33 of them (22 percent) to civil hospitals, the others to Matteawan. In August, 1966, there was a shift in concepts of danger, and in the next six months, of the 61 such admissions, 37 (61 percent) were to civil hospitals. There was considerable staff anxiety at first, but this has also subsided with experience, and none of the hospitals reports any

particular problems. The potentially more dangerous character disorders tend to have transitory psychotic episodes which clear up so that the patients become defendants again, to be sent back to the court for disposition. Those with more serious psychotic illness tend to settle into an amenable patient role under treatment.

The *Baxstrom* operation, which at first loomed up as a major convulsion, a year later has virtually disappeared from everyone's consciousness in the civil state hospitals. For Dannemora and Matteawan, however, the consequences have been more profound. The personnel from the beginning felt their jobs threatened by the drop in patient population. The Dannemora State Hospital, with its patient population dropping from 994 on February 28, 1966, to 487 six months later, has had a freezing of 35 hospital officer positions. The liberated space facilitated a significant new development, however. The 1966 legislature enacted the Clinton Prison Diagnostic and Treatment Center on the Dannemora grounds. The hospital itself can take only those prisoners certified as mentally ill. The new center is designed to serve inmates with mental and emotional problems who may not be certifiable, by offering intensive diagnostic and treatment services, while also serving as a research and training center. The center has been organized and is in operation, with its professional program directed by the McGill University Department of Forensic Psychiatry. The first 50 inmates were received in October, 1966, and another 50 in March, 1967. It is planned to expand this to accommodate 150 to 200.

At Matteawan, the patient population dropped from 1,465 on February 28, 1966, to 804 in October. This resulted in the freezing of 200 hospital officer positions. No jobs were lost, however; there were already 167 vacancies, and the remaining excess members were assigned to positions in the treatment area. The vacant space made possible another move, the establishment of the Beacon Institution for Defective Delinquents, on their grounds. These individuals had before this been in a separate institution at Napanoch. This move is expected to make possible an improved program for the defective delinquents by using the exist-

ing staff and facilities at Matteawan, while liberating the Napanoch facility for badly needed additional reformatory space.

A number of new statutory developments have taken place since the *Baxstrom* decision. Some have been referred to above. In May, 1966, the state's highest court cited *Baxstrom* in holding that an indigent mental patient in a habeas corpus proceeding is entitled to counsel as a constitutional right (*People ex. rel. Rogers v. Stanley*, 17 N.Y. 2d 256). Later in the year the legislature enacted provisions for assignment of counsel and appointment of expert witnesses at state expense for indigent persons in proceedings which might result in loss of liberty for mental illness. Also enacted that summer was authority for the Department of Correction to operate halfway houses, and a whole new system of discretionary relief of first offenders from the forfeitures and disabilities automatically imposed by law on convicted persons. While all these legislative measures cannot be attributed solely to the effects of the *Baxstrom* decision, it can be said that they were initiated by the social and legal philosophies which were developing to produce *Baxstrom*, and that the *Baxstrom* decision itself was a catalytic and accelerating force.

The clinical experience with these "insane criminals" and "criminally insane" raises questions concerning the need and the wisdom of placing such persons in special security facilities just because of their legal status. Most of the *Baxstrom* patients had been eligible for transfer to civil hospitals by consent of the Commissioner of Mental Hygiene long before the Supreme Court decision. Most of them had been examined at least once, often several times, by experienced psychiatrists from Mental Hygiene and had been denied transfer on grounds of being too disturbed or potentially dangerous. Yet over 99 percent of them did well in civil hospitals when the court decision compelled the move. This would appear to be another instance of institutionalized expectations putting blinders on our perceptions.

The decision has also had a profound effect upon thinking and planning in legal and governmental circles concerning the use of prison-type facilities to confine the mentally ill. There is now almost unanimous questioning of the constitutionality of so

confining any mentally ill persons other than (1) convicted prisoners under sentence, or (2) non-prisoners found too dangerous for a civil hospital by judicial procedure with all the due process and procedural safeguards to which any person is entitled.

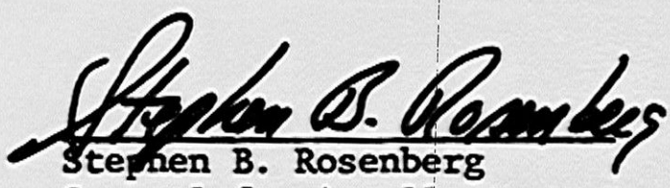
Ironically enough, Johnnie K. Baxstrom is not himself a living beneficiary of the new developments. Late in May, 1966, he was discharged from a civil state hospital by court order after a jury trial, despite the testimony of a hospital psychiatrist that his release would be tantamount to a death sentence. Two weeks later, Baxstrom died in status epilepticus as predicted.

SUMMARY

1. A decision of the U.S. Supreme Court resulted in the movement of 969 "insane criminals" and "criminally insane" from the hospitals of the New York State Department of Correction to the civil state hospitals of the Department of Mental Hygiene during the period March to August, 1966.
2. After one year there have been no significant problems with the patients. All have been absorbed into the general patient population, many reside on open wards, over 200 have been released, and only seven have been certified as too dangerous for a civil hospital.
3. The experience has stimulated a variety of administrative and legislative moves toward liberalizing and improving the state's programs for the mentally ill and for offenders.
4. The clinical experience raises questions concerning the need and the wisdom of placing the mentally ill in special security facilities just because of their legal status.
5. Legal circles are questioning the constitutionality of confining any mentally ill person in a prison-type facility unless there has either been conviction for an offense, or special danger established by judicial determination with full due process.

CERTIFICATE OF SERVICE

I hereby certify that copies of this brief have, this 16th day of October, 1968, been hand-delivered to the United States Attorney's Office, U.S. Courthouse, Constitution Avenue and John Marshall Place, Washington, D.C.



Stephen B. Rosenberg
Counsel for Appellant